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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/936,672	01/23/2002	Carolyn Cupp	112701-320	9108

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EXAMINER

HENDRICKS, KEITH D

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 06/30/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/936,672

Applicant(s)

CUPP ET AL.

Examiner

Keith Hendricks

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on (RCE) of 4-25-05.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-5,7-11,13-16 and 18-35 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5,7-11,13-16 and 18-35 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Priority

It is again noted that this application claims priority to PCT/EP01/00307 and US application 09/483,328. However, as previously stated, the subject matter of claims 21-24, 25-27, 29-30, 32-33 and 35 does not find support in the 09/483,328 application, and thus *the effective priority date for the subject matter of claims 21-35, is January 10, 2001*, the filing date of PCT/EP01/00307.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-5, 7-11, 13-16, 18-20, 25, 28-29, 31-32 and 34-35 are rejected under 35 U.S.C. 102(b) as being anticipated by Gellman et al. (US PAT 4,743,460), in view of Simone et al. (US PAT 5,407,661).

Gellman et al. is incorporated as cited in a previous Office action.

Simone et al. is taken as cited at pages 3-4 of the Office action of June 20, 2003. To point, Simone et al. disclose an edible pet food product comprising a matrix which comprises cellulose (insoluble) fiber, gelatinized starch and protein components, a humectant such as glycerin, and oral care additives. Simone et al. disclose that the addition of dental/oral care compounds such as tetrasodium pyrophosphate or other inorganic pyrophosphate salts, to pet foods, was well known and performed in the art. See col. 4. Simone et al. provide an improvement in this field, where the product, when chewed, does not easily fracture and wherein the ingredients are inert to, and compatible with, oral care additives, assuring maximum bioavailability of the additives (col. 2, summary, mid-col. 5).

Thus, it would have been obvious to one of ordinary skill in the art to have incorporated an oral care additive, such as tetrasodium pyrophosphate as taught by Simone et al., within the canine biscuit pet food product of Gellman et al. Initially, it is noted that the amendment of the claims to include "an agent selected from the group consisting of abrasive agents, dental care agents and combinations thereof", does

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not appear to be the actual crux of that which applicant considers their invention. It does, admittedly, remove the rejection of the majority of the claims over Gellman et al. from the realm of 35 U.S.C. 102(b), but it does not appear to provide a patentable contribution to the art. As Simone et al. demonstrate, the inclusion of such dental care additives in pet food products was well known in the art, for it was a primary goal of many of the known products to provide improved health and plaque removal for the teeth of the pet, just as is commonly done in food for human consumption. Simone et al. provide a pet chew/food product with very similar components and percentages as that of the instant claims, as well as Gellman et al., and thus it would not have involved an inventive step to have included this known component into the pet food product of Gellman et al. Given the positive teachings and motivation of Simone et al., the ordinarily-skilled artisan would have found it well within the ordinary level of skill in the art to have accomplished this task.

Claims 22-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gellman et al. in view of Simone et al., taken as cited above, and further in view of Schommer et al. The references and rejection are incorporated as cited in a previous Office action.

Schommer et al. disclose a food container for mixing both wet and dry pet foods. At column 1, it is stated that it was known that pets prefer both wet and dry foods, and that "in the past, pet owners have purchased dry pet food and canned wet food in separate containers, and then mixed them to feed their pet." The patent teaches the mixing of dry and wet pet foods. Thus, it would have been obvious to one of ordinary skill in the art to have performed this commonly-known method of pet food mixing, for example with the known food of Gellman et al., in view of Simone et al. The selection of the amount of both dry and wet foods would not have involved an inventive step, and would have been well within the ordinary level of skill in the art to have provided an approximately equal balance of wet food and dry food.

Claims 21, 24, 27, 30 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gellman et al. in view of Simone et al., taken as cited above, and further in view of Wang et al. The references and rejection are incorporated as cited in a previous Office action.

Wang et al. is cited as teaching the general production of pet food pieces in the form of various shapes. According to the reference, the cross section shape may be formed into that of "a star, an oval", etc. (mid col. 4; col. 9, lines 19-22).

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Thus it would have been obvious to one of ordinary skill in the art to have provided the pet food product of Gellman et al., in view of Simone et al., in any of several known common shapes, for purposes of marketing and sales. The formation of pet food pieces into common shapes was well known and performed in the art, as taught by Wang et al. The simple selection of a particular shape would not have involved an inventive step, given the specific teachings of Wang et al., and would not impart a patentable feature, *per se*, to the claimed invention.

Response to Arguments
(Prior art rejections)

Applicant's arguments with respect to the claims have been considered but are moot in view of the new ground(s) of rejection.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

i) Claims 1-5, 7-11, 13-16 and 18-20 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-9 of U.S. Patent No. 6,841,178, in view of Simone et al., taken as cited above.

Although the conflicting claims are not identical, they are not patentably distinct from each other because they are both directed to pet food chew products (and methods of use) of various sizes, with the

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same density properties and overlapping ingredients of denatured proteins and starches, insoluble fibers, etc. As Simone et al. demonstrate, the inclusion of such dental care additives in pet food products was well known in the art, for it was a primary goal of many of the known products to provide improved health and plaque removal for the teeth of the pet, just as is commonly done in food for human consumption. Simone et al. provide a pet chew/food product with very similar components and percentages as that of the instant claims, and thus it would not have involved an inventive step to have included this known component into the claimed pet food product. Given the positive teachings and motivation of Simone et al., the ordinarily-skilled artisan would have found it well within the ordinary level of skill in the art to have accomplished this task.

Applicant states that the current claims present “novel subject matter”, yet this is not deemed persuasive in light of the rejection above.

ii) Claims 1-5, 7-11, 13-16 and 18-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-33 of copending Application No. 10/037,941.

Although the conflicting claims are not identical, they are not patentably distinct from each other because they are both directed to pet food chew products (and methods of use) of various sizes, with the same density properties and overlapping ingredients of denatured proteins and starches, insoluble fibers, etc. As Simone et al. demonstrate, the inclusion of such dental care additives in pet food products was well known in the art, for it was a primary goal of many of the known products to provide improved health and plaque removal for the teeth of the pet, just as is commonly done in food for human consumption. Simone et al. provide a pet chew/food product with very similar components and percentages as that of the instant claims, and thus it would not have involved an inventive step to have included this known component into the claimed pet food product. Given the positive teachings and motivation of Simone et al., the ordinarily-skilled artisan would have found it well within the ordinary level of skill in the art to have accomplished this task.

Applicant states that the current claims present “novel subject matter”, yet this is not deemed persuasive in light of the rejection above.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

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Conclusion

Claim 26 is free of the prior art of record.

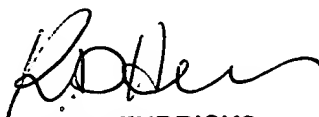
Applicant's amendment (switching the claims to specifically require the presence of a humectant) necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (571) 272-1401. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


KEITH HENDRICKS
PRIMARY EXAMINER